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Relevant Docket Entries

January 19, 1968	Complaint and Affidavit [Filed]
January 22, 1968	Motion to Dismiss Complaint [Filed]
February 6, 1968	Final Order of Dismissal [Filed]
February 21, 1968	Opinion and Judgment of the United States Court of Appeals, 10th Circuit [Filed]

Amended Complaint

(Filed January 19, 1968)

UNITED STATES DISTRICT COURT

DISTRICT OF WYOMING

Civil Action No. 5194

JAMES J. OESTERREICH,

Plaintiff,

—v.—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 11, Cheyenne, Wyoming, SELECTIVE SERVICE APPEAL BOARD FOR THE STATE OF WYOMING; COL. JACK P. BRUBAKER, Wyoming Selective Service Director,

Defendants.

Plaintiff, by his attorneys, complaining of defendants, alleges as follows:

1. Plaintiff is a citizen of the United States and of the State of Wyoming.

2. Defendant Local Board No. 1P is a duly constituted local board of the United States Selective Service System, created by Act of Congress, 62 Stat. 618, as amended, 50 App. U.S.C. 460. Defendant Selective Service Appeal Board for the State of Wyoming is a duly constituted Appeal Board of the United States Selective Service System, created by Act of Congress, 62 Stat. 618, as amended, 50 App. U.S.C. 460. Defendant Col. Jack P. Brubaker is and has been the State Director of the Wyoming State Selective Service System.

3. The jurisdiction of this court is predicated upon 28 U.S.C. 1331, 1343 and 2201, the matter in controversy exceeding the value of $10,000 exclusive of interest and costs, and arises under the Constitution and laws of the United States including 62 Stat. 618, 50 App. U.S.C. 460, and the First, Fifth and Sixth Amendments of the Constitution of the United States.

4. Plaintiff is a male adult citizen. He is and has been, at all times hereinafter referred to, a registrant under the Selective Service System of the United States.

5. Plaintiff Oestereich, a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full time course of instruction in a recognized theological or divinity school, namely, Andover Newton Theological School, Newton Centre, Massachusetts, was, on June 20, 1966, by defendant Local Board No. 11, properly placed in Classification 4-D, which classification is regularly provided for in the Military Selective Service Act of 1967 and the regulations promulgated thereunder, namely, Section 1622.43 of Title 32, Code of Federal Regulations. Plaintiff has at all times herein referred to maintained the status necessary for his 4-D classification.

6. On October 16, 1967, plaintiff, together with numerous other persons duly registered under the Universal Military Training and Service Act, for the sole purpose of expressing dissent from the participation by the United States in the war in Vietnam, returned to the Government of the United States the registration certificate (SSS Form 2) issued him by defendant Local Board.

7. On November 7, 1967 a Delinquency Notice (SSS Form 304) was mailed to plaintiff informing him that he had been declared "A Delinquent" because of "failure to have in his possession a duly authorized registration certificate (SSS Form 2)" and "failure to provide the local board of his current status".

8. By notice mailed November 7, 1967, plaintiff was notified by defendant Local Board No. 11 that he had been reclassified in 1-A. After duly notifying defendant Local Board No. 11 that he appealed his 1-A classification, plaintiff was advised by notice dated December 27, 1967, that defendant Appeal Board had affirmed the 1-A classification issued by defendant Local Board No. 11.

9. On December 27, 1967, defendant Local Board No. 11 mailed to the plaintiff an order to report for induction (SS Form 252) notifying plaintiff to report for induction into the armed forces of the United States on January 24, 1968.

10. Plaintiff has never failed, neglected or refused to perform any lawful duty required of him under said Act or the rules, regulations or directions issued thereunder.

11. Plaintiff has exhausted all the administrative remedies available to him.

12. The declaration that plaintiff is a delinquent, his reclassification to 1-A, and the order issued to him to report for induction, exceeded the statutory and constitutional jurisdiction of the defendants and are wholly without foundation either under said Act or any other statute, regulation or authority.

13. The declaration of plaintiff as a delinquent, his reclassification, and the order issued to him to report for induction, are all punitive in nature, depriving him of a exempt status to which he is properly entitled, were imposed as a penalty by unauthorized and unconstitutional administrative process, and are entirely unrelated to the statutory mandate imposed upon defendants to hear and determine claims with respect to inclusion for, or deferment from, the obligations of serving in the armed forces of the United States.

14. The declaration of plaintiff as a delinquent, his reclassification, and the order issued to him to report for induction, are designed to, and will inevitably have the effect of penalizing the assertion of rights under the First Amendment to the Constitution of the United States.

15. The induction of plaintiff into the Armed Forces of the United States, unless restrained by this court, will cause the plaintiff irreparable injury and damage, in violation of his rights, for which plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays:

(a) That defendants, their agents, servants and employees, be temporarily restrained, and upon full hearing of this matter be permanently restrained and enjoined from undertaking the induction or directing the induction of plaintiff into the Armed Forces of the United States and from interfering with the exercise of First Amendment rights in the manner alleged and set out in the complaint;

(b) That the court adjudge the declaration of plaintiff as a delinquent as null and void and of no legal effect to

alter plaintiff's prior 4-D status under the Military Selective Service Act of 1967;

(c) That the court adjudge that the reclassification of plaintiff is null and void and of no legal effect to alter plaintiff's prior 4-D status under the Military Selective Service Act of 1967;

(d) That the court declare that Selective Service regulations 1602.4 and 1642.1-1642-46, on their face or as applied in this case, violate the United States Constitution;

(e) That the court declare that Selective Service regulations 1617.1 and 1623.5, on their face or as applied in this case, violate the United States Constitution; and

(f) That the court order the defendant to restore to plaintiff his prior 4-D classification; and

(g) For such other and further relief as the court deems just.

JOHN A. KING
P.O. Box 1147
Laramie, Wyoming

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y. 10010

Attorneys for Plaintiff

January , 1968

Affidavit of James Oestereich

(January 5, 1968)

Second Year Student in Theology
Studying for the Ministry
Andover-Newton Theological School
215 Herrick Road
Newton Centre, Mass.

Employed as Youth Minister
Since Fall of 1966
United Parish
39 Main
Lunenburg, Mass.

Account of Events with Reference to Draft Status—
Carried Out from Local Board Number 11
Cheyenne, Wyoming 82001
Post Office Box number 26

October 16, 1967

I joined with some one thousand fellow seminarians, students and other young men of draft age, along with myriads of adult supporters, in an act of collective conscience in support of our dying and suffering brothers who are presently fighting on our behalf in Viet Nam. At this time I turned my draft card over to a participating clergyman, who took the cards to the Justice Department in Washington D. C. on October 20, 1967, and turned them in as a symbol of our desire to support our boys by stimulating an end to the war by grass-roots citizen participation.

The purposes for our act were defined by the corporate Resistance as follows

To demonstrate that clergy and laymen will risk the same unjust fate as students and other youths who feel compelled to turn in their draft cards in abhorrence either of the war in Viet Nam, all wars, conscription in general, or discriminatory deferments and exemptions in particular.

To show allegiance to freedom of conscience above and beyond the narrow and sometimes criminal laws of the state.

To affirm the prophetic role of church and synagogue, along the lines of the national Clergy Concerned draft aid project where individual houses of worship would serve as counseling centers.

I would define this act as a responsible expression of concerned citizens, acting in light of the first amendment of the Constitution of the United States, which states:

> Congress shall make no law regarding the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

November 7, 1967

At this time I was declared "delinquent" by my local board, and reclassified 1-A. My previous classification was IV-D.

Following my basic right of appeal, I appealed my classification on December 6, 1967. The 1-A classification states that the holder is "available for military service." Not being in this state as a candidate for the ministry I can find ample reason for such appeal.

December 27, 1967.

On this date I was mailed an induction notice for January 24, 1968, by vote of the appeal board.

Given this sequence of events I submit the following data concerning my position with reference to this case.

In the preceding events I have been acting corporately within a basic structure of responsible protest, and also out of my understanding of the claims which the Christian faith brings to bear on the human situation. Those claims run as follows.

The Christian faith has traditionally been understood as an encounter between God and man where man responds to God's revelation by concrete participation in the structures and decisions of life, with a transcending loyalty to the will of God, the authority of the scriptures, and the community of interpretation which is the church.

Through many centuries of confronting the question of war, the church has forged out a doctrine of the "Just War." This doctrine has been accepted by the major denominations and divisions within the churches in one form or another. Our unity does not come at the point of pacifism, but rather in a more largely agreed sense with the concrete analysis of each situation on the basis of the principles we have learned in our history.

The basic tenets of the just war doctrine are as follows:

1. Is the war fought for purposes which are just?

2. Is there a reasonable prospect of success?

3. Does waging the war cause less evil than would be caused by not waging war?

4. Can the war be fought in a way that discriminates betwen combatants and noncombatants, between the guilty and the innocent?

5. Can the war be fought so as to use only that degree of force and violence which is proportionate to the requirements of success in achieving justice through the war?

Without going into elaborate and lengthy arguments it is a conviction of a large and growing number of churchmen that a thorough and concise analysis of the Viet Nam situation reveals this war to be in violation of most of the criteria of the just war doctrine and is a major threat to the security and peace of the world. Indeed the present conflict also violates the SEATO pact, the U.N. charter, the Constitution of the United States where Congress has the responsibility for declaring war, and the Nuremburg statutes, which are now American law.

Given this series of broken covenants and the unjust nature of the war, I have interpreted my duty as a citizen, a Christian, and a concerned human being to stand against such a conflict openly, in exercising of my rights.

The Draft System—

Let me now briefly single out why I have taken this stance with relation to the selective service system.

First of all, as the Nuremburg principles guide, it is clear that all Americans have a responsibility for what is going on in Viet Nam. The Selective Service system lies at the heart of this responsibility. Those of us youth who are in the shadow of the system are the ones from whom the challenge must come. Thus we have chosen to serve our country by refusing to disgrace it by participating in a struggle which only stands to cost us lives, at the gain of economic, social, and spiritual death.

Secondly, and most important, there is no provision for conscientious objection on the basis of a Christian interpretation of the just war doctrine (which provides the only possible rationale for the state as well), which is the position of the larger bodies of the church. I was left with no alternative than to return the classification I possessed and disassociate myself from this system. All of this was done as an exercise of my deepest religious and moral convictions.

It is in this understanding then that I must protest the Local Board in Cheyenne for giving me a classification which is incommensurate with my faith and beliefs. A 1-A classification, which indicates the holder's readiness for military service is a violation of my rights as a ministerial candidate and a citizen, under the first amendment.

I have refused to hide from the Selective Service System. I take my stand, as a representative of the corporate Christian community which stands both with me and alongside, including my Seminary and my local church. Together we stand in the American tradition of non-violent resistance and redemptive civil disobedience, committed to our country's cloudy destiny and our God ordained rights within her shores.

/s/ JAMES OSTEREICH

Commonwealth of Massachusetts
Middlesex County

Subscribed and sworn to before me this eighth day of January 1968.

/s/ MARGARET E. BURNS, Notary Public

Motion to Dismiss Complaint

(Filed January 22, 1968)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

[CAPTION OMITTED]

Comes now the United States Attorney for the District of Wyoming and respectfully moves the court to dismiss the plaintiff's complaint heretofore filed in this case for the reason that the court does not have jurisdiction to determine the issues asserted by the plaintiff by reason of the provisions of Public Law 90-40, 81 Stat. 100, Section 8 (c), approved June 30, 1967.

The government further asserts as a ground for dismissal that the constitutional issues asserted by the plaintiff for determination should properly be considered by a three-judge district court as provided by Title 28 USC 2282, rather than by a single district judge.

The foregoing statutory provisions provide an exclusive method of judicial review for the issues involved in this case and have not been followed by the plaintiff.

ROBERT N. CHAFFIN
United States Attorney

Final Order of Dismissal

(Filed February 6, 1968)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

[CAPTION OMITTED]

The above-entitled matter having come on regularly for hearing before the Court on January 22, 1968, plaintiff appearing by and through his counsel, John A. King and Melvin L. Wulf, and defendants appearing by and through Robert N. Chaffin, United States Attorney for the District of Wyoming, and LeRoy Amen, Assistant United States Attorney for the District of Wyoming, and the Court having heard the oral arguments of counsel for plaintiff and of counsel for defendants, and having carefully examined the record on file herein, including the pleadings and the affidavits of plaintiff and his counsel, and having examined the brief submitted by plaintiff's counsel and having studied the authorities relied upon by plaintiff's counsel and by counsel for defendants, and being fully advised in the premises, Finds:

1. The prior Orders made and entered herein on January 22 and 23, 1968, are inconclusive and non-determinative of the issues raised by the pleadings and fail properly to adjudicate the rights of the parties herein, and should be set aside.

2. Plaintiff's pleading filed herein on January 19, 1968, contains no caption to identify his action. For the purposes

of the hearing thereon and of this Order, said pleading is treated as a complaint and a motion for a temporary restraining order.

3. Plaintiff's jurisdictional allegations are mere conclusions unsupported by factual allegations in the complaint and his assertions of federal jurisdiction are unsubstantial, frivolous and without merit. His complaint fails to satisfy the jurisdictional requirements of 28 U.S.C. 1331, 1343, and 2201 in the following particulars:

a. Plaintiff's action does not arise under the Constitution, laws or treaties of the United States. His complaint contains no allegations of facts that defendants subjected him to unreasonable, arbitrary or invidious discrimination, or that he was deprived of his constitutional rights under the First, Fifth, and Sixth Amendments of the Constitution of the United States. Federal jurisdiction is not conferred by the mere assertion of constitutional rights unsupported by factual allegations.

b. Plaintiff's allegation that the matter in controversy exceeds the value of $10,000.00 exclusive of interest and costs is made only for the purpose of invoking the jurisdiction of this court. Plaintiff seeks no monetary damages and does not allege facts which are determinative of the value of the rights sought to be gained by his action. His complaint and argument are concerned with intellectual freedom rather than with economic loss. The failure of jurisdiction of this court under 28 U.S.C. 1331 appears on the face of the complaint for its failure to allege facts showing that the matter in controversy exceeds the sum or value of $10,000.00 exclusive of interest and costs, or to show

facts from which such jurisdictional requirement may be inferred.

c. Sub-sections (1) and (2) of 28 U.S.C. 1343 are inapplicable to confer jurisdiction on this court for the reason that plaintiff does not seek to recover damages. Sub-section (3) of 28 U.S.C. 1343 is likewise inapplicable as no state statute, law, ordinance, regulation, custom or usage is involved in this action. Sub-section (4) of 28 U.S.C. 1343 confers jurisdiction only where an Act of Congress providing for the protection of civil rights is involved and no such Act of Congress is relied upon by plaintiff. Hence 28 U.S.C. 1343 does not support the jurisdiction of this court over plaintiff's action.

d. 28 U.S.C. 2201 does not establish a new basis for jurisdiction of federal courts, but provides a new remedy merely. It requires diversity of citizenship and the statutory jurisdictional amount in controversy to confer jurisdiction on this court. Plaintiff and defendant Col. Jack P. Brubaker are citizens of the State of Wyoming. Plaintiff alleges no monetary damages and asserts no value on the rights he seeks to protect by this action. This Court, therefore, lacks jurisdiction under 28 U.S.C. 2201 for plaintiff's failure to satisfy the requirements of diversity of citizenship and jurisdictional sum or value in controversy.

4. This Court has no jurisdiction to grant judicial review of the classification or processing of the plaintiff by the local board, the appeal board, or the President. Plaintiff does not challenge his classification as a defense to a criminal prosecution, and he has not responded either

affirmatively or negatively to the order of December 27, 1967, to report for induction. The statutory conditions of Public Law 90-40 approved June 30, 1967, 81 Stat. 100, Section 8 (c), 50 App. U.S.C. Section 460 as amended, are not satisfied. Congress may grant or withhold judicial review of administrative action except when required by the Constitution. Estep v. United States, 327 U.S. 114 (1946).

5. Plaintiff fails to allege that there is no basis in fact for the 1-A classification assigned to him. Neither does he allege that defendants acted in an arbitrary or capricious manner in re-classifying him, nor that defendants discriminated against him by such re-classification.

6. Defendants are arms of the Executive branch of the United States Government, and their performance of their duties imposed upon them by the Universal Military Training and Selective Service Act is not subject to the supervision of or direction by the Judicial Department. This Court has no jurisdiction to encroach upon the discretion vested in defendants in the performance of their responsibilities under the Act. To assume jurisdiction over plaintiff's action would violate the fundamental constitutional precept of separation of powers of the Executive and Judicial Departments of the United States.

7. Plaintiff knowingly violated the law and the regulation requiring him to have his registration certificate in his possession at all times.

8. The exempt status claimed by plaintiff and the classification assigned to him are matters of legislative and executive grace. Exemptions and classifications are a privilege, not an inalienable right conferred by the constitution

or statute. Absent positive allegations of arbitrary or capricious acts, defendants have the right and duty to exercise their informed discretion and classify plaintiff without interference by the judiciary.

9. Plaintiff's allegations that the declaration of delinquency, the re-classification, and the order of induction are punitive in nature, imposed as a penalty, are unsubstantiated conclusions of fact; they are merely illusory conclusions and opinions based on conjecture. The administrative action taken by defendants does not constitute penal action as it does not subject plaintiff to criminal punishment.

10. Section 2282 of 28 U.S.C. providing for a court of three judges is not applicable unless questions are raised in the complaint as to the constitutional validity of an Act of Congress. It does not apply to administrative orders or action. It confines its requirement for a court of three judges to cases where an Act of Congress is attacked upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States. Plaintiff's action does not attack any act of Congress on constitutional grounds and raises no substantial question of constitutional validity of the Universal Military Training and Selective Service Act. Plaintiff's action challenges the validity of the administrative action with regard to his individual induction status; his prayer only, challenges the validity of the regulations under the Universal Military Training and Selective Service Act. Plaintiff's action raises no substantial question of constitutional validity as to the Act itself. Plaintiff's complaint, therefore, is not within 28 U.S.C. 2282 providing for the convocation of a three-judge District

Court. William Jameson & Co. v. Morgenthau, 307 U.S. 171 (1939); Sardino v. Federal Reserve Bank of New York, et al., 2 Cir., 361 F.2d 106 (1966).

NOW, THEREFORE, IT IS ORDERED that the Order of this Court made and entered herein on January 22, 1968, denying temporary restraining order and dismissing complaint, and the Order Nunc Pro Tunc made and entered herein on January 23, 1968, dismissing the complaint of the plaintiff, be, and the same are hereby, set aside.

IT IS FURTHER ORDERED that plaintiff's motion for temporary restraining order and plaintiff's complaint, together with the cause, be, and the same are hereby, dismissed for the reasons stated herein, the parties to pay their own costs.

Dated this 6th day of February, 1968.

EWING T. KERR
Judge

Judgment of the United States Court of Appeals for the Tenth Circuit

January Term, Wednesday, February 21st, 1968.

[CAPTION OMITTED]

Before Honorable David T. Lewis, Honorable Jean S. Breitenstein and Honorable John J. Hickey, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Wyoming and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

Opinion of the United States Court of Appeals for the Tenth Circuit

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 9902—January Term, 1968

[CAPTION OMITTED]

Before Lewis, Breitenstein and Hickey, Circuit Judges.

PER CURIAM.

The judgment is affirmed for the reasons set forth in the memorandum decision of the trial court and particularly in view of the jurisdictional restrictions contained in 50 App. U.S.C. §460(b)3. Orderly classification of a registrant for military service is not punitive in nature. Compare United States v. Capson, 10 Cir., 347 F.2d 958. Appellant is not denied his right to ultimate judicial review of his claimed rights. Witmer v. United States, 348 U.S. 375, 377.